



Comments of the

World Shipping Council

Submitted to the

Federal Maritime Commission

In the Matter of

**Ocean Common Carrier and Marine Terminal Operator Agreements Subject to the
Shipping Act of 1984
Docket No. 16-04**

October 14, 2016

The World Shipping Council (“WSC” or “the Council”) files these comments in response to the Notice of Proposed Rulemaking (“NPRM”) published in the above-referenced docket on August 15, 2016 (81 Fed. Reg. 53986).

WSC addresses two policy issues in these comments. The first issue is an apparent misapplication by the Commission of both the antitrust laws and the Shipping Act to the analysis of which agreements may properly be exempted from the 45-day waiting period for agreement effectiveness. If in fact such a legal misunderstanding exists, it may materially affect the Commission’s approach in the NPRM.

The second issue that WSC addresses is the need for the Commission’s regulations to allow parties to vessel sharing agreements and alliances the flexibility to make routine adjustments to their operations in response to market conditions without having to file agreement amendments for activities within the scope of existing agreement authority. We believe that the Commission shares this objective, but the regulatory language in the NPRM in will need to be adjusted to avoid unintended consequences.¹

A. Appropriate Regulatory Changes Must Be Informed by a Correct Understanding of the Law

The Commission’s analysis in the NPRM appropriately begins with a discussion of the applicable law. It appears, however, that the Commission’s understanding is either incorrect or has been stated inaccurately in the NPRM. In either case, we discuss separately below the Commission’s statements regarding antitrust law and the Shipping Act as those authorities apply to the Commission’s regulation of ocean common carrier agreements.

1. Alliance and VSA Agreements Are Not *Per Se* Illegal Under the Antitrust Laws

In the “Discussion” section of the NPRM (81 Fed. Reg. at 53989), the Commission begins its explanation of its proposed change to the definition of “capacity rationalization” with the following statement:

“Technically, however, the Commission views an agreement on the amount of vessel capacity supplied in a service or trade as the rationalization of capacity between carriers, and is proposing to clarify the definition of capacity rationalization to reflect

¹ WSC supports the separate comments filed by a number of carrier agreements. Those agreement comments primarily address important issues of how the proposed changes will affect the day-to-day operation of agreements, whereas the WSC comments address selected policy-level issues.

this view. Under the application of U.S. antitrust law, agreements between competitors to fix supply in a market are viewed as potentially harmful and anticompetitive, and like agreements to fix prices, are *per se* illegal, regardless of and without any examination of their purported purposes, harms, benefits, or effects. *Per se* illegal agreements are not acceptable activities that are permitted within a ‘safety zone’ for collaboration between competitors under the FTC/DOJ guidelines. In part, it was this principle of a ‘safety zone’ of competitor collaboration that was used as a basis for the low market share exemption.” (Citing *Antitrust Guidelines for Collaborations Among Competitors*, FTC/DOJ, April 2000; footnotes omitted.)

The Commission cites to page 3 of the FTC/DOJ *Competitor Collaboration Guidelines* in support of the statement quoted above, and notes that these guidelines were part of the basis for the adoption of the low market share exemption as adopted in 2004. The problem with the Commission’s reliance on the *per se* discussion in the FTC/DOJ *Guidelines* is that alliances and VSAs would, under antitrust law, be reviewed under a rule of reason standard, not a *per se* standard. Thus, to the extent that antitrust law is relevant, the *Collaboration Guidelines* language that is applicable here is on pages 4 and 8, not page 3, of those guidelines.

Page 4 of the *Competitor Collaboration Guidelines* states:

“Agreements not challenged as *per se* illegal are analyzed under the rule of reason to determine their overall competitive effect. These include agreements of a type that otherwise might be considered *per se* illegal, provided they are reasonably related to, and reasonably necessary to achieve procompetitive benefits from, an efficiency-enhancing integration of economic activity. “

Similarly, page 8 of the *Guidelines* states:

“If, however, participants in an efficiency-enhancing integration of economic activity enter into an agreement that is reasonably related to the integration and reasonably necessary to achieve its procompetitive benefits, the Agencies analyze the agreement under the rule of reason, even if it is of a type that might otherwise be considered *per se* illegal.” (footnote omitted)

WSC is aware of no VSA or alliance agreement, past or present, that includes provisions on capacity deployment that are not part of a larger, efficiency-producing coordination. To the contrary, provisions in such agreements relating to the number and capacity of vessels, routing of vessels, etc. are included in order to define the service to be provided by the agreement parties and to describe their respective rights and responsibilities with respect to the assets deployed. Under the antitrust laws, therefore, such agreements would be analyzed under the rule of reason, not a *per se* approach.

To the extent that the Commission continues to use antitrust law analysis to inform its waiting period exemption, it is essential that the Commission employ the correct antitrust analysis.

It appears here that the Commission has applied a *per se* analytical perspective when the proper perspective is a rule of reason analysis. It appears further that application of the wrong standard has resulted in a regulatory proposal that provides a “safe harbor” exemption that is more restrictive than is appropriate. In addition to increasing the regulatory burden on filing carriers, sweeping more agreements into the 45-day review process may cause Commission resources to be misallocated.

2. It is Important that Agreement Filing Rules Are Based on a Correct Understanding of the Shipping Act

Following its discussion of the antitrust laws, the Commission discusses the Shipping Act standard for deciding when the Commission may exercise its authority to challenge a carrier agreement in court. The Commission there also recognizes the efficiencies and cost savings that such agreements provide. In the third column on page 53989 of the NPRM, the Commission talks about the Shipping Act:

“The Commission acknowledges that VSAs and alliances can promote economic efficiencies and cost savings in the offering of services to shippers. Depending on market conditions, however, agreements with such a direct impact on capacity, especially in trades where their parties may discuss and agree on rates, can potentially be used to reduce competition and unreasonably affect transportation services within the meaning of section 6(g) of the Act (46 U.S.C. 41307(b)), which justifies a thorough initial review of their competitive impact under the 45-day waiting period.”

WSC does not question the Commission’s statutory duty and authority to exercise an oversight role with respect to agreement activities covered by the Shipping Act. Indeed, that is one of the Commission’s core functions under the Act. Because that role is defined by the Shipping Act, however, it is important that the Commission’s bases for proposed regulatory action are fully consistent with the Shipping Act. On that point, the Commission’s recitation in the NPRM of the Act’s section 6(g) standard differs in two ways from the language of the Act.

First, the Commission in the NPRM refers to agreements that may “potentially” reduce competition. The statutory standard for challenging an agreement in court is that it is “likely” – not “potentially” – by a reduction in competition – to unreasonably reduce service or cause an unreasonable increase in transportation cost to shippers.

The second way in which the Commission's recitation of the 6(g) standard fails accurately to reflect the Shipping Act standard is that the Commission's statement ignores the fact that the Act requires that an unreasonable reduction in service or increase in transportation cost must be *caused* by a reduction in competition, not simply contemporaneous with the latter.

Insisting on an accurate understanding and implementation of the controlling statute (and the antitrust laws to the extent they are relevant) is not nit-picking, because the Shipping Act embodies a carefully calibrated set of policy choices by Congress. On the one hand the Commission is to have visibility into and the authority to challenge agreements in court if they contravene the 6(g) standard. At the same time, the Congress made clear that the Act is to be implemented "with a minimum of government intervention and regulatory costs" 46 U.S.C. 40101(1). Translating that statutory balance into practical terms, WSC and its members are most concerned that the Commission's regulations neither operate in such a way that they undermine the efficiencies that VSAs and alliances bring nor prevent agreement parties from responding appropriately to changes in the market – changes that do not recognize a forty-five day waiting period.

One way that the Commission could implement a legal understanding that appropriately reflects the low competition risks of agreements that do not authorize parties to make concerted restrictions on the capacity to be deployed in a trade would be to remove the two-party limit for space charter agreements that are exempt from the waiting period under proposed §535.308. The proposed exemption already requires that any authority be non-exclusive, and capacity rationalization authority (see further discussion below) is also a disqualifying factor for this exemption. There is no legal or economic theory under which an agreement meeting those two criteria would pose a competitive concern, and the presence of those two disqualifying factors (exclusivity and capacity rationalization) is sufficient to remove any risk irrespective of the number of parties. As such, the limit on the number of permissible parties serves no purpose, and it should be removed.

B. The Proposed Regulations Should Be Adjusted to Clarify the Distinction between Exempt and Non-Exempt Agreements

It appears that the Commission agrees with industry comments filed at the ANPRM stage of this proceeding that it remains appropriate to exempt some agreements from the 45-day waiting period before an agreement may become effective. For example, in discussing why it did not accept a proposal made in comments filed by a group of ocean carrier agreements regarding the definition of "capacity rationalization," the Commission noted its proposed

exemption for space charter agreements in §535.308. The Commission also states that “agreement modifications to reflect changes in the number or size of vessels within the range specified in an agreement . . . should be exempt from the waiting period as non-substantive modifications in §535.302.” 81 CFR at 53990.

The policy decision to continue exemptions from the 45-day waiting period for specified agreements is appropriate, but the language proposed to carry out that policy will require some adjustment in order for the Commission’s intent to be realized. There are several sections for which the proposed language requires adjustment.

There are three regulatory provisions that are directly relevant to the question of which agreements are exempt from the 45-day waiting period.

The first relevant provision is 46 C.F.R. § 535.104(e), the definition of “capacity rationalization.” That definition is referenced in two other relevant sections: 535.308 (exemption from 45-day waiting period for space charter agreements without capacity rationalization authority, referencing 535.502(b)); and 535.311 (low market share agreements that do not include capacity rationalization authority, also referencing 535.502(b)).

Because both section 535.308 and section 535.311 reference capacity rationalization authority as precluding application of those exemptions, the definition of “capacity rationalization” is central to the application of those two exemptions. The Commission’s stated intent is to allow application of these exemptions to otherwise qualified agreements so long as those agreements do not contain capacity rationalization authority. Specifically, the Commission states that:

“It is the interpretation of the Commission that space charter agreements can be distinguished from VSAs in that the parties to slot charter agreements are not authorized to discuss or agree upon the amount of vessel capacity to be deployed in a service or trade, which would place a concerted limit or restriction on the supply of capacity made available by the parties.” (81 Fed. Reg. at 53990, emphasis added)

WSC agrees that the distinction that the Commission seeks to define can be made and practically applied. However, the language that the Commission has proposed to make that distinction will not accomplish the task. The Commission’s proposed new definition of “capacity rationalization” in the NPRM is:

“Capacity rationalization means the authority in an agreement by or among ocean common carriers to discuss, or agree on, the amount of vessel capacity supplied by the parties in any service or trade within the geographic scope of the agreement.”

In order to see the problem, contrast the underlined language from the NPRM quoted above with the proposed definition of “capacity rationalization.” The underlined NPRM language includes a qualification that the proposed definition does not; namely, that slot or space charter agreements eligible for exemption not include authority that “would place a concerted limit or restriction on the supply of capacity made available by the parties.” The “capacity rationalization” definition, in contrast, says nothing about a “concerted limit or reduction on the supply of capacity.” Instead, that definition brings within its scope all agreements containing “the authority . . . to discuss, or agree upon, the amount of vessel capacity supplied . . .” (emphasis added). The terms “discuss” and “agree upon” are clearly separate, independent authorities (connected by the disjunctive “or”) that may bring an agreement within the definition of “capacity rationalization” authority.

If “discussion” of vessel capacity meets the definition, how can a space charter agreement that states the amount of capacity to be deployed not fall within that definition? Specifically, in order to place such information in an agreement signed by multiple parties, that information must first be “discussed” by the parties. Thus, such an agreement, even though it does not authorize coordinated decisions on capacity deployment, could fall within the term “capacity rationalization” as the Commission proposes to define that term.

When measured against the Commission’s express intention about its scope, the definition proposed for “capacity rationalization” is too broad. The Commission unequivocally states in the NPRM that it means for the capacity rationalization definition to apply only where the parties to an agreement are authorized to “place a concerted limit on the supply of capacity,” and WSC agrees that that is a defensible exercise in line-drawing. To implement that intention, however, the language of the proposed new definition must be changed, because the existing language does not include the concept of “a concerted limit.”² One way to fix the problem would be simply to incorporate into the definition of “capacity rationalization” the quoted language above from the NPRM that states the Commission’s intention. A revised definition might then read:

“Capacity rationalization means the authority in an agreement by or among ocean common carriers to discuss, or agree on, the amount of vessel capacity supplied by the

² The Commission asserts on page 53990 of the NPRM that “[r]eferencing the number or size of vessels in a space charter agreement is not the same as providing the authority for the parties to discuss and agree on the amount of vessel capacity in a service or trade.” WSC agrees with that assertion. WSC does not agree, however, with the Commission statement that follows; namely, the assertion that the definition of “space charter agreement” makes the distinction clear. The only operative distinguishing factor in that definition is that a “space charter agreement” may not contain capacity rationalization authority. But as discussed in the text associated with this footnote, the proposed definition of the term “capacity rationalization” is the source of the regulatory ambiguity, not the cure for that ambiguity.

parties in any service or trade within the geographic scope of the agreement in such a way that such discussion or agreement would place a concerted limit or restriction on the supply of capacity made available by the parties.” (new proposed language underlined)

In addition to clearly codifying the Commission’s stated intent in its own words, such a definition would provide agreement parties and their counsel a workable standard for determining the regulatory requirements applicable to their agreements, including requirements on waiting period, information forms, and periodic reporting. Failure to address this fundamental lack of clarity in the current proposal would be directly counter to one of the Commission’s stated purposes for initiating this rulemaking – to avoid uncertainty associated with ambiguity in the definition of “capacity rationalization.” See 81 Fed. Reg. at 53989, middle column).³ If the Commission does not make this change to its proposed definition, it will render the space charter agreement and low market share exemptions virtually meaningless, a result that would result in more cost and burden to both carriers and the Commission – with no benefit to the Commission’s ability to perform its oversight role.

C. The Commission Must Clarify the Relationship Between Sections 535.302 and 535.408 in the Final Rule

The Commission proposes to add a new subsection (a)(4) to section 535.302. That new subsection would exempt from the waiting period an agreement modification that:

“(4) Reflects changes in the number or size of vessels within the range of capacity specified in the agreement pursuant to the express enabling authority for operational matters identified in §535.408(b)(5)(ii).”

Section 535.408(b)(5)(ii), which is referenced in the proposed new subsection 535.302(a)(4), states that the following changes do not require further filings:

“Changes in vessel size, number of vessels, or vessel substitution or replacement, if the resulting change is within a capacity range specified in the agreement”

WSC supports the Commission’s objective of not applying the 45-day waiting period to actions to implement capacity changes within a range stated in an already effective agreement. The

³ Put differently, the Commission should not replace one definition of “capacity rationalization” that does not comport with the Commission’s practice (the situation today as described at page 53989) with a different definition that suffers from the same defect.

placement of the proposed new subsection (4) in 535.302(a), however, is likely to cause confusion. This is the case because 535.302(c) states that:

“A copy of a modification described in (a) or (b) of this section shall be submitted to the Commission but is otherwise exempt from the waiting period requirement of the Act and this part.”

Under that existing 535.302(c) language, to which no changes are proposed, agreement modifications regarding capacity changes within a stated range “shall” be filed with the Commission. However, existing section 535.408 states in part that precisely the same types of agreements (as described in 535.408(b)(5)(ii)) “are permitted without further filing.” In other words, 535.302 says that carriers must file such implementing agreements, and 535.408 says that such agreements do not need to be filed. That contradiction must be addressed.

Our understanding is that the waiting period exemption for in-range capacity changes proposed for 535.302(a)(4) is designed to provide relief when carriers voluntarily file such amendments. WSC supports that proposed flexibility. In order to maintain that flexibility without causing the conflict between 535.302 and 535.408 that is described above, the proposed language for 535.302(a)(4) could be modified to clarify that such filings are not mandatory by adding the following at the beginning of proposed new §535.302(a)(4):

“One that is filed voluntarily with the Commission and that reflects changes . . . [remainder unchanged]”

Adding this qualifying phrase brings into the scope of 535.302 only those in-range capacity changes that are filed voluntarily, thus removing the conflict that would otherwise exist between 535.302 (with its mandatory filing requirements) and 535.408 (which exempts the same agreement modification type from filing).

D. The Commission’s Decision on the Scope of Information Form Detail is Appropriate

The Commission states in the NPRM at page 53997 that it declines to adopt the suggestion made by the NCBFAA that every VSA be required to include information about a long list of operational plans and potential contingencies. WSC supports the Commission’s decision not to include the suggested items in the information form requirements. Many of the items suggested by NCBFAA, such as drayage capacity, dwell times on terminals, chassis availability, and terminal free time, are beyond the carrier’s control. In addition, those operational factors vary depending on conditions such as overall demand for terminal-related

services, weather, cargo volumes, etc. With so many variables, any answers provided at the time of filing would necessarily be speculative. Finally, NCBFAA has made no case that these sorts of questions are relevant to a proper analysis under section 6(g) of the Shipping Act, and such a case would be difficult indeed to make.

E. Conclusion

WSC encourages the Commission in the final rule to correct the misstatements in the NPRM regarding the application of the antitrust laws and the Shipping Act to the issues addressed by this rulemaking. WSC also encourages the Commission, in light of a proper understanding of those authorities, to modify the space charter agreement exemption language proposed for §535.308 to delete the two party limit on the number of carriers in such an agreement.

With respect to the definition of “capacity rationalization,” WSC urges the Commission to revise the language in the final rule to conform to the Commission’s expressly stated intended meaning. Specifically, the Commission should add a qualifying phrase to the definition to clarify that capacity rationalization involves the authority for parties to an agreement to take concerted action with respect to the vessel capacity employed within the geographic scope of the agreement. Such an approach would allow the Commission to avoid wasting its oversight resources on those agreements that have no possibility of adversely affecting competition, and would reduce the burden on carriers that are parties to such agreements.

Finally, WSC strongly encourages the Commission to further examine the relationship between sections 535.302 and 535.408 to resolve the conflict between those sections regarding the need to file with the Commission agreements on capacity changes that fall within the range stated in an already filed and effective agreement. WSC supports the outcome that the Commission seeks with respect to such pre-defined capacity adjustments, but the language as proposed will require adjustment to meet that objective.

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